

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | | |
|---------------------------------|---|-----------------------------|
| EDDIE ROJAS, |) | |
| |) | No. CV-11-0096-JPH |
| |) | |
| Plaintiff, |) | ORDER GRANTING DEFENDANT'S |
| |) | MOTION FOR SUMMARY JUDGMENT |
| |) | |
| v. |) | |
| |) | |
| MICHAEL J. ASTRUE, Commissioner |) | |
| of Social Security, |) | |
| |) | |
| |) | |
| Defendant. |) | |

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on July 27, 2012. (ECF No. 13, 16). Attorney Cory J. Brandt represents plaintiff; Special Assistant United States Attorney Gerald J. Hill represents the Commissioner of Social Security (defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7). After reviewing the administrative record and the briefs filed by the parties, the court **grants** defendant's Motion for Summary Judgment

JURISDICTION

Plaintiff filed applications for a period of disability, disability insurance benefits (DIB), and supplemental security income (SSI) on December 11, 2006, alleging disability as of February 10, 2003 (Tr. 16). The applications were denied initially and on reconsideration.

Administrative Law Judge (ALJ) Gene Duncan held a video hearing on September 18, 2009, with plaintiff appearing in

1 Wenatchee, Washington (Tr. 39-83). The ALJ issued an unfavorable
2 decision on October 9, 2009 (Tr. 16-33). The Appeals Council
3 denied review on January 6, 2011 (Tr. 1-5). The ALJ's October
4 2009 decision became the final decision of the Commissioner, which
5 is appealable to the district court pursuant to 42 U.S.C. §
6 405(g). Plaintiff filed this action for judicial review on March
7 7, 2011 (ECF No. 1, 4).

8 **STATEMENT OF FACTS**

9 The facts have been presented in the administrative hearing
10 transcript, the ALJ's decision, and the briefs of the parties.
11 They are only briefly summarized here.

12 Plaintiff was born on March 16, 1963 (Tr. 120) and was 39
13 years old at the time of the alleged onset date. Plaintiff has
14 obtained a GED (Tr. 43) and has past work as a convenient store
15 cashier, forklift operator and general laborer (Tr. 74-75).
16 Plaintiff alleged he was unable to work because of lumbar/thoracic
17 strain and spasm; left foot ganglion cyst removal; bilateral lower
18 extremity radiculopathy; adjustment disorder with depression;
19 antisocial personality disorder; bilateral foot pain, left more
20 severe than right; low back pain; and bilateral hand pain and
21 weakness (Tr. 150).

22 At the administrative hearing, Plaintiff testified he has
23 been sober for about five or six years following treatment, but
24 did relapse on alcohol on one occasion about three years prior to
25 the hearing (Tr. 44-45). He stated he was last incarcerated about
26 six months prior to the hearing for a driving offense (Tr. 45).
27 Plaintiff reported he has been to jail at least 40 or 50 times for
28 domestic violence, DUIs, thefts, shoplifting, not paying fines and

1 driving offenses (Tr. 200). He also served one prison sentence of
2 15 months on a 1993 molestation charge and is currently required
3 to register as a sex offender (Tr. 200).

4 SEQUENTIAL EVALUATION PROCESS

5 The Social Security Act (the Act) defines disability as the
6 "inability to engage in any substantial gainful activity by reason
7 of any medically determinable physical or mental impairment which
8 can be expected to result in death or which has lasted or can be
9 expected to last for a continuous period of not less than twelve
10 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
11 provides that a plaintiff shall be determined to be under a
12 disability only if any impairments are of such severity that a
13 plaintiff is not only unable to do previous work but cannot,
14 considering plaintiff's age, education and work experiences,
15 engage in any other substantial gainful work which exists in the
16 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
17 Thus, the definition of disability consists of both medical and
18 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
19 (9th Cir. 2001).

20 The Commissioner has established a five-step sequential
21 evaluation process for determining whether a person is disabled.
22 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
23 is engaged in substantial gainful activities. If so, benefits are
24 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If
25 not, the decision maker proceeds to step two, which determines
26 whether plaintiff has a medically severe impairment or combination
27 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
28 416.920(a)(4)(ii).

1 If plaintiff does not have a severe impairment or combination
2 of impairments, the disability claim is denied. If the impairment
3 is severe, the evaluation proceeds to the third step, which
4 compares plaintiff's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
8 App. 1. If the impairment meets or equals one of the listed
9 impairments, plaintiff is conclusively presumed to be disabled.
10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents plaintiff from
13 performing work which was performed in the past. If a plaintiff
14 is able to perform previous work, that plaintiff is deemed not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, plaintiff's residual functional capacity (RFC) is
17 considered. If plaintiff cannot perform past relevant work, the
18 fifth and final step in the process determines whether plaintiff
19 is able to perform other work in the national economy in view of
20 plaintiff's residual functional capacity, age, education and past
21 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
22 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

23 The initial burden of proof rests upon plaintiff to establish
24 a *prima facie* case of entitlement to disability benefits.
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
26 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
27 met once plaintiff establishes that a physical or mental
28 impairment prevents the performance of previous work. The burden

1 then shifts, at step five, to the Commissioner to show that (1)
2 plaintiff can perform other substantial gainful activity and (2) a
3 "significant number of jobs exist in the national economy" which
4 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
5 Cir. 1984).

6 STANDARD OF REVIEW

7 Congress has provided a limited scope of judicial review of a
8 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
9 the Commissioner's decision, made through an ALJ, when the
10 determination is not based on legal error and is supported by
11 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
12 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
13 1999). "The [Commissioner's] determination that a plaintiff is
14 not disabled will be upheld if the findings of fact are supported
15 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
16 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
17 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
18 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
19 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
20 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
21 573, 576 (9th Cir. 1988). Substantial evidence "means such
22 evidence as a reasonable mind might accept as adequate to support
23 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
24 (citations omitted). "[S]uch inferences and conclusions as the
25 [Commissioner] may reasonably draw from the evidence" will also be
26 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
27 On review, the Court considers the record as a whole, not just the
28 evidence supporting the decision of the Commissioner. *Weetman v.*

1 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
2 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

3 It is the role of the trier of fact, not this Court, to
4 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
5 evidence supports more than one rational interpretation, the Court
6 may not substitute its judgment for that of the Commissioner.
7 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
8 (9th Cir. 1984). Nevertheless, a decision supported by
9 substantial evidence will still be set aside if the proper legal
10 standards were not applied in weighing the evidence and making the
11 decision. *Browner v. Secretary of Health and Human Services*, 839
12 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
13 evidence to support the administrative findings, or if there is
14 conflicting evidence that will support a finding of either
15 disability or nondisability, the finding of the Commissioner is
16 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
17 1987).

18 **ALJ'S FINDINGS**

19 The ALJ determined that plaintiff meets the insured status
20 requirements of the Act through December 31, 2006 (Tr. 18). At
21 step one, the ALJ found plaintiff has not engaged in substantial
22 gainful activity since February 10, 2003, the alleged onset date
23 (Tr. 18). At step two, the ALJ found plaintiff had severe
24 impairments of "depression; personality disorder, antisocial
25 traits; and alcohol and cocaine abuse, in remission" (Tr. 18).
26 The ALJ extensively evaluated the medical evidence of record (Tr.
27 18-25) and specifically concluded that there was no objective
28 medical findings to support plaintiff's allegations of severe low

1 back pain, wrist and hand pain, degenerative disc disease, carpal
2 tunnel syndrome or any rheumatological impairment (Tr. 23). The
3 ALJ also held that while plaintiff had complaints of foot pain and
4 did undergo surgery for the alleged impairment, it is offset by
5 the fact that the record reflects that the surgery was generally
6 successful in relieving symptoms and there was no continuous 12-
7 month period where this impairment would have prevented plaintiff
8 from performing substantial gainful work activity (Tr. 25). The
9 ALJ thus determined that plaintiff's left foot neuroma was also a
10 non-severe impairment (Tr. 25-26).

11 At step three, the ALJ found plaintiff's impairments, alone
12 and in combination, did not meet or medically equal one of the
13 listed impairments in 20 C.F.R., Appendix 1, Subpart P,
14 Regulations No. 4 (Tr. 26). The ALJ then assessed plaintiff's RFC
15 (Tr. 28). The ALJ determined plaintiff could perform light work,
16 except he should avoid heights, dangerous machinery, working
17 around children and disadvantaged adults, security type work or
18 being involved in the safety of others, having intense interaction
19 with others and coworkers and having direct access to drugs or
20 alcohol (Tr. 28). The ALJ further determined that plaintiff is
21 capable of occasional supervisory contact and must receive clear
22 expectations and structure from supervisors and should work
23 independently (Tr. 28).

24 With respect to plaintiff's credibility,¹ the ALJ stated that
25 plaintiff's medically determinable impairments could reasonably be

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27 ¹Plaintiff does not contest the ALJ's credibility finding
28 and does not discuss any of the ALJ's reasons for this finding.
(ECF No. 14). Plaintiff has thus waived any challenge to the
ALJ's evaluation of Plaintiff's credibility.

1 expected to cause the alleged symptoms; however, plaintiff's
2 statements concerning the intensity, persistence and limiting
3 effects of the symptoms were not credible to the extent they were
4 inconsistent with the ALJ's RFC assessment (Tr. 29). As noted by
5 the ALJ, the record contains affirmative evidence of a motivation
6 for secondary gain (Tr. 29, 241). Grant County Mental Health
7 progress notes dated July 21, 2003, indicate that plaintiff
8 reported working with an elderly man but had no real desire to
9 look for full time employment, knowing he would have 50 percent of
10 his earnings taken for past child support. He reported having
11 jumped from job to job in the past to avoid having to pay the
12 child support and having lived off the system for so long he had
13 no real need to seek employment (Tr. 29, 241). The ALJ also noted
14 there was very little in the record to support plaintiff's
15 subjective complaints of mental impairments and that there were
16 also some inconsistencies in plaintiff's reporting during his
17 evaluations (Tr. 29). The ALJ further indicated that objective
18 medical evidence did not support the level of physical limitation
19 plaintiff claimed, and plaintiff's apparent drug-seeking behavior
20 detracted from his allegations (Tr. 30). There is also record
21 evidence of plaintiff's excuses for not following through with
22 treatment (i.e., fear of needles and lack of means to travel to an
23 appointment) (Tr. 30). The ALJ stated that if plaintiff's health
24 problems were not severe enough to motivate him to follow through
25 with treatment, it is difficult to accept his assertion that they
26 are disabling (Tr. 30).

27 At step four, the ALJ found that plaintiff was unable to
28 perform any of his past relevant work (Tr. 32). However, at step

five, based on the vocational expert testimony and plaintiff's age, education, work experience, and RFC, the ALJ found that there were jobs that exist in significant numbers in the national economy that plaintiff could perform, including the jobs of agriculture sorter, peeled potato inspector and cannery worker (Tr. 32-33). Accordingly, the ALJ concluded that plaintiff was not disabled as defined by the Social Security Act from February 10, 2003, through the date of his decision, October 9, 2009 (Tr. 33).

ISSUES

Plaintiff alleges the ALJ erred as follows:

1. By finding plaintiff did not have any "severe" physical impairments;
2. By improperly rejecting the opinions of plaintiff's treating and examining medical providers; and
3. By failing to include all of plaintiff's limitations in the hypothetical presented to the vocational expert.

(ECF No. 14 at 12-20).

DISCUSSION

A. Medical Evidence

Plaintiff's main contention is that the ALJ improperly rejected the opinions of his treating and examining medical providers. (ECF No. 14 at 16-19). Plaintiff specifically argues that the opinions of Tiffany Friesen, M.D., and Mahlon Dalley, Ph.D., were rejected on impermissible grounds.

The courts distinguish among the opinions of three types of physicians: treating physicians, physicians who examine but do not treat the claimant (examining physicians) and those who neither examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating

1 physician's opinion is given special weight because of her
2 familiarity with the claimant and his physical condition. *Fair v.*
3 *Bowen*, 885 F.2d 597, 604-605 (9th Cir. 1989). Thus, more weight
4 is given to a treating physician than an examining physician.
5 *Lester*, 81 F.3d at 830. However, the treating physician's opinion
6 is not "necessarily conclusive as to either a physical condition
7 or the ultimate issue of disability." *Magallanes v. Bowen*, 881
8 F.2d 747, 751 (9th Cir. 1989) (citations omitted).

9 The Ninth Circuit has held that "[t]he opinion of a
10 nonexamining physician cannot by itself constitute substantial
11 evidence that justifies the rejection of the opinion of either an
12 examining physician or a treating physician." *Lester*, 81 F.3d at
13 830. Rather, an ALJ's decision to reject the opinion of a
14 treating or examining physician, may be *based in part* on the
15 testimony of a nonexamining medical advisor. *Andrews v. Shalala*,
16 53 F.3d 1035, 1043 (9th Cir. 1995). The ALJ must also have other
17 evidence to support the decision such as laboratory test results,
18 contrary reports from examining physicians, and testimony from the
19 claimant that was inconsistent with the physician's opinion.
20 *Andrews*, 53 F.3d at 1042-1043. Moreover, an ALJ may reject the
21 testimony of an examining, but nontreating physician, in favor of
22 a nonexamining, nontreating physician only when he gives specific,
23 legitimate reasons for doing so, and those reasons are supported
24 by substantial record evidence. *Roberts v. Shalala*, 66 F.3d 179,
25 184 (9th Cir. 1995).

26 **1. Dr. Friesen**

27 Plaintiff argues that the ALJ improperly rejected the opinion
28 of Dr. Friesen, plaintiff's long-time treating physician. (ECF

1 No. 14 at 16-18). Defendant responds that the ALJ's evaluation of
2 Dr. Friesen's opinions was reasonable. (ECF No. 17 at 11-13).

3 Dr. Friesen repeatedly opined that plaintiff was limited to
4 sedentary exertion level work with no pushing, pulling, lifting or
5 carrying more than 10 pounds, no bending, crouching, kneeling or
6 stooping, and no repetitive hand or arm movements (Tr. 283-286,
7 287-290, 361-364, 365-368, 370-373).

8 Dr. Friesen's opinions, however, are inconsistent with the
9 objective medical evidence of record. As noted by the ALJ, no
10 objective medical findings in the record support limitations due
11 to plaintiff's alleged low back, wrist or hand pain. Testing
12 refuted any nerve damage, severe degenerative disc disease, carpal
13 tunnel syndrome or any rheumatological impairment (Tr. 23, 30).

14 X-rays of the thoracic spine taken on November 8, 2005 were
15 negative (Tr. 23, 468). An MRI scan of plaintiff's lumbar spine
16 on November 21, 2005 was "completely normal" (Tr. 23, 374).
17 Bilateral hand x-rays taken on December 9, 2005 demonstrated no
18 significant abnormality and only an old healed fracture of the
19 left 5th metacarpal (Tr. 24, 467). Physical therapist Randy C.
20 Bruce, MSPT, indicated on February 10, 2006, that plaintiff was
21 being discharged from physical therapy and "on his last visit was
22 having no pain" (Tr. 23, 293). Plaintiff was referred to Eric P.
23 Thorson, M.D., for an orthopedic evaluation on March 31, 2006.
24 Dr. Thorson indicated that x-rays of the hands and wrists showed
25 no evidence of abnormality (Tr. 24, 329). He noted that
26 plaintiff's subjective complaints were "somewhat out of proportion
27 to the findings on clinical exam" (Tr. 329). Nerve conduction
28 studies completed in May 2006 demonstrated borderline abnormal

1 with right median sensory amplitude low without an abnormal
2 latency across the wrist. It is noted that this finding did not
3 clinically correlate with the examination and there was no
4 evidence of carpal tunnel syndrome (Tr. 23, 470). Additional
5 nerve conduction studies completed on July 26, 2006 had findings
6 against a significant carpal tunnel syndrome or ulnar neuropathy
7 to account for plaintiff's complaints of his hands (Tr. 24, 322-
8 323).

9 On July 26, 2006, neurologist Richard A. Dickson, M.D.,
10 examined plaintiff and indicated that plaintiff presented with
11 multiple complaints in regard to his feet, hands, arms and legs,
12 and back, "none of which are associated with definitive neurologic
13 signs" (Tr. 24, 325). He opined that it would be atypical for
14 plaintiff to have carpal tunnel syndrome. (Tr. 325). Also on
15 July 26, 2006, rheumatologist J. Richard Newton, M.D., examined
16 plaintiff and found "no evidence of a peripheral neuropathy or an
17 immune mediated inflammatory disease" (Tr. 24, 327). He opined
18 that surgery would not be helpful for plaintiff's feet. (Tr.
19 327). X-rays taken on September 15, 2006, demonstrated only mild
20 degenerative changes at L2-3, L3-4 and L4-5 (Tr. 23, 466). Lumber
21 spine x-rays taken on April 7, 2008, demonstrated only minor
22 hypertrophic degenerative change. Otherwise, negative lumbosacral
23 spine series with bending films (Tr. 23-24, 592). Bilateral hand
24 x-rays were taken on April 7, 2008, and these were negative (Tr.
25 24, 593). On October 16, 2008, plaintiff was evaluated by James
26 R. Irwin, M.D., with regard to a mass on plaintiff's right hand
27 (Tr. 24, 719). Dr. Irwin's examination was unremarkable and no
28 further treatment was recommended. *Id.* On October 21, 2008,

1 plaintiff again underwent nerve conduction studies of both median
2 and right ulnar nerves and this was negative for carpal tunnel
3 syndrome. The results indicated left and right median nerve
4 conduction is within normal limits and right ulnar nerve
5 conduction is within normal limits (Tr. 24, 711). On October 31,
6 2008, George Monlux, M.D., reported there was no evidence of
7 carpal tunnel syndrome by nerve conduction (Tr. 24-25, 711). On
8 December 4, 2008, plaintiff was evaluated by J. Chad Byrd, M.D.,
9 due to plaintiff's complaints of diffuse pain (Tr. 25, 642). Dr.
10 Byrd indicated he did not see evidence of an inflammatory
11 arthritis (Tr. 642).

12 The ALJ indicated he gave great weight to the opinions of
13 Drs. Newton, Dickson, Monlux, Thorson, Irwin and Byrd as these
14 physicians are specialists and found no objective evidence to
15 substantiate plaintiff's complaints of carpal tunnel syndrome,
16 peripheral neuropathy, radiculopathy or neurological deficits (Tr.
17 30-31). The opinions of these doctors is also consistent with the
18 opinion of state agency reviewing physician Morris Fuller, M.D.²
19 (Tr. 491-498, 528). The foregoing medical evidence does not
20 support the level of physical limitation assessed by Dr. Friesen.

21 The ALJ additionally gave little weight to Dr. Friesen
22 because "she apparently relied heavily on the subjective report of
23 symptoms and limitations provided by [plaintiff], and seemed to
24 uncritically accept as true most, if not all, of what [plaintiff]

25
26 ²On February 13, 2007, and April 18, 2007, Dr. Fuller opined
27 that plaintiff could frequently lift and/or carry 25 pounds,
28 occasionally lift and/or carry 50 pounds, stand and/or walk and
sit about 6 hours in an 8-hour workday and was unlimited in his
ability to push and/or pull (Tr. 492).

1 reported" (Tr. 31). As indicated above, the ALJ determined that
2 Plaintiff was not fully credible, and plaintiff does not contest
3 the ALJ's credibility determination. A physician's opinion may be
4 disregarded when it is premised on the properly rejected
5 subjective complaints of a plaintiff. *Tonapetyan v. Halter*, 242
6 F.3d 1144, 1149 (9th Cir. 2001).

7 The undersigned finds that the ALJ provided specific,
8 legitimate reasons supported by substantial evidence for giving
9 little weight to the opinions of Dr. Friesen. The ALJ's physical
10 RFC determination is supported by the reports of Drs. Newton,
11 Dickson, Monlux, Thorson, Irwin, Byrd and Fuller as well as the
12 record evidence of medical testing results.

13 **2. Dr. Dalley**

14 Plaintiff argues that the ALJ failed to provide specific and
15 legitimate reasons for rejecting Dr. Dalley's opinions. (ECF No.
16 14 at 18-19). Defendant responds that the ALJ did not, in fact
17 reject Dr. Dalley's opinions. (ECF No. 17 at 13-15). Rather, the
18 ALJ's assessment of plaintiff's mental RFC is consistent with Dr.
19 Dalley's assessments.

20 On April 24, 2003, plaintiff underwent a psychological
21 evaluation with Behavioral Assessments and Counseling (Brooke
22 Sjostrom, M.S., adopted by Dr. Dalley) (Tr. 199-206). At that
23 time, plaintiff was diagnosed with alcohol dependence, early full
24 remission; cocaine dependence, early full remission; and an
25 antisocial personality disorder (Tr. 201). Plaintiff was given a
26 global assessment of functioning (GAF) score of 70 (Tr. 201), and
27 no marked or severe functional limitations were assessed (Tr.
28 205). Plaintiff reported he was physically able to do anything

1 but mentally felt depressed and lacked a desire to work (Tr. 19,
2 199). It was opined that plaintiff did not exhibit a
3 psychological condition that would interfere with his ability to
4 keep a job (Tr. 19, 201).

5 On May 11, 2005, plaintiff underwent another psychological
6 evaluation with Behavioral Assessments and Counseling (Abigail
7 Osborne, M.S., adopted by Dr. Dalley) (Tr. 275-282). It was noted
8 that plaintiff had participated in another inpatient chemical
9 dependency treatment program in March 2004 and was in an aftercare
10 outpatient program at that time (Tr. 20, 275). Plaintiff was
11 given the same diagnoses, but his GAF score was lowered to 53³
12 (Tr. 277). Again, no marked or severe functional limitations were
13 assessed (Tr. 281). It was noted that it was difficult to
14 determine if plaintiff's depressive symptoms were independent of
15 the effect of his substance abuse (Tr. 20, 278). It was again
16 opined that plaintiff did not exhibit a psychological disability
17 that would prevent him from working (Tr. 20, 278).

18 On June 15, 2006, plaintiff was again evaluated by Behavioral
19 Assessments and Counseling (Ms. Osborne, adopted by Dr. Dalley)
20 (Tr. 300-308). At that time, plaintiff was diagnosed with an
21 adjustment disorder with depressed mood; alcohol dependence,
22 sustained full remission; cocaine dependence, sustained full
23 remission; and an antisocial personality disorder (by history)
24 (Tr. 302). His GAF score had risen to 56, indicative of moderate
25 symptoms or moderate difficulty (Tr. 302), yet the check-box form
26

27 ³A GAF of 60-51 reflects: Moderate symptoms or moderate
28 difficulty in social, occupational, or school functioning. See
DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (4th ed. 1994).

1 accompanying the report indicated plaintiff would have marked
2 limitations in his ability to relate appropriately to co-workers
3 and supervisors and to respond appropriately to and tolerate the
4 pressures and expectations of a normal work setting (Tr. 307). A
5 check-box form, however, is entitled to little weight. *Crane v.*
6 *Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (stating that the ALJ's
7 rejection of a check-off report that did not contain an
8 explanation of the bases for the conclusions made was
9 permissible). Here, not only does the check-box form of these
10 medical providers fail to contain an explanation for the
11 conclusions reached, but it is also inconsistent with the
12 narrative report of the medical providers. In any event, the form
13 indicated that the symptoms were expected to last a maximum of
14 only 6 months⁴ (Tr. 308). The medical professionals opined that
15 once plaintiff's symptoms had stabilized, he may be able to return
16 to work (Tr. 303).

17 In summation, Dr. Dalley's first two assessments concluded
18 that plaintiff did not exhibit a psychological disability that
19 would prevent him from working. Dr. Dalley's final assessment,
20 although noting marked impairments with interacting with
21 supervisors and others on the check-box form, did not mention such
22 severe impairments in the narrative report and, in any event,
23 indicated the symptoms would last a maximum of only 6 months and
24 he would then be able to work.

25 Contrary to plaintiff's argument, Dr. Dalley's assessments
26 are not inconsistent with the ALJ's mental RFC determination. In

27
28 ⁴These limitations would thus not meet the duration
requirements of the Act (one year). 42 U.S.C. § 1382c(a)(3)(A).

1 this case, the ALJ determined plaintiff could perform light work,
2 but should avoid, among other things, having intense interaction
3 with others and coworkers (Tr. 28). The ALJ further determined
4 that plaintiff is capable of only occasional supervisory contact
5 and must receive clear expectations and structure from supervisors
6 and should work independently (Tr. 28). This mental RFC
7 determination reflects significant limitations in plaintiff's
8 ability to tolerate interaction with supervisors, coworkers and
9 the public and is therefore not inconsistent with the reports of
10 Dr. Dalley. The ALJ's mental RFC determination is in accord with
11 the weight of the record evidence.

12 **B. Severe Impairments**

13 Plaintiff also contends that the ALJ should have determined
14 that he suffered from severe physical impairments. (ECF No. 14 at
15 15-16). Defendant responds that plaintiff has failed to meet his
16 step two burden in this regard. (ECF No. 17 at 15-16). Defendant
17 argues that the objective medical evidence shows no more than
18 minimal physical limitations in this case. *Id.* The undersigned
19 agrees.

20 Plaintiff has the burden of proving that he has a severe
21 impairment at step two of the sequential evaluation process. 42
22 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 423(d)(1)(A), 416.912. In
23 order to meet this burden, plaintiff must furnish medical and
24 other evidence that shows that he has a severe impairment. 20
25 C.F.R. § 416.912(a). The regulations, 20 C.F.R. §§ 404.1520(c),
26 416.920(c), provide that an impairment is severe if it
27 significantly limits one's ability to perform basic work
28 activities. An impairment is considered non-severe if it "does

1 not significantly limit your physical or mental ability to do
2 basic work activities." 20 C.F.R. §§ 404.1521, 416.921. "Basic
3 work activities" are defined as the abilities and aptitudes
4 necessary to do most jobs. 20 C.F.R. §§ 404.1521(b), 416.921(b).

5 Step two is "a de minimis screening device [used] to dispose
6 of groundless claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th
7 Cir. 1996), and an ALJ may find that a claimant lacks a medically
8 severe impairment or combination of impairments only when this
9 conclusion is "clearly established by medical evidence." S.S.R.
10 85-28; see, *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.
11 2005). Applying the normal standard of review to the requirements
12 of step two, the Court must determine whether the ALJ had
13 substantial evidence to find that the medical evidence clearly
14 established that plaintiff did not have a medically severe
15 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
16 ("Despite the deference usually accorded to the Secretary's
17 application of regulations, numerous appellate courts have imposed
18 a narrow construction upon the severity regulation applied
19 here."); *Webb*, 433 F.3d at 687.

20 Here, the ALJ concluded there was no objective medical
21 findings to support plaintiff's allegations of severe low back
22 pain, wrist and hand pain, degenerative disc disease, carpal
23 tunnel syndrome or any rheumatological impairment (Tr. 23). As
24 indicated in Section A, testing refuted any nerve damage, severe
25 degenerative disc disease, carpal tunnel syndrome or any
26 rheumatological impairment. See *supra*. There is simply no
27 objective evidence to substantiate plaintiff's complaints of
28 carpal tunnel syndrome, peripheral neuropathy, radiculopathy or

1 neurological deficits. Accordingly, the ALJ did not err by
2 finding no severe physical impairments in this regard.

3 With respect to plaintiff's complaints of foot pain, the ALJ
4 held that while plaintiff did undergo surgery for the alleged
5 impairment, it is offset by the fact that the record reflects that
6 the surgery was generally successful in relieving symptoms and
7 there was no continuous 12-month period where this impairment
8 would have prevented plaintiff from performing substantial gainful
9 work activity (Tr. 25). The ALJ thus determined that plaintiff's
10 left foot neuroma was also a non-severe impairment (Tr. 25-26).
11 Plaintiff has failed to demonstrate otherwise. The ALJ's
12 determination regarding plaintiff's foot pain is supported by the
13 substantial weight of the record evidence.

14 The undersigned finds that the ALJ did not err at step two of
15 the sequential evaluation process in this case.

16 **C. Step Five**

17 Because the undersigned finds that the ALJ's evaluation of
18 the evidence is appropriate and the ALJ's RFC determination is
19 supported by substantial evidence, plaintiff's argument that the
20 hypothetical presented to the vocational expert was incomplete is
21 without merit. The ALJ's step five determination is also proper.

22 **CONCLUSION**

23 Having reviewed the record and the ALJ's conclusions, this
24 court finds that the ALJ's decision is free of legal error and
25 supported by substantial evidence. Accordingly,

26 **IT IS HEREBY ORDERED:**

27 1. Defendant's Motion for Summary Judgment (**ECF No. 16**) is
28 **GRANTED.**

IT IS SO ORDERED. The District Court Executive is directed to file this Order, provide copies to the parties, enter judgment in favor of Defendant, and **CLOSE** this file.

DATED this 13th day of August, 2012

S/ James P. Hutton

JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE